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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Idaho Public Utilities Commission	)	
Petition for Rulemaking Pursuant to	)	CC Docket No. 98-221
Section 251(h)(2) of the Communications Act	)	

RESPONSE TO COMMENTS AND OPPOSITIONS

Cox Communications, Inc., ("Cox"), by its attorneys, responds to the comments and oppositions that were filed addressing the Idaho Public Utilities Commission Petition for Declaratory Ruling (the "Petition"). The Idaho PUC argued that CTC Telecom, Inc. ("CTC"), a competitive LEC preparing to provide integrated telecommunications, Internet and cable service in a new residential development outside of Boise, should be classified for regulatory purposes as an incumbent LEC. The Petition further argues that all "similarly situated" carriers also should be classified as incumbent local exchange carriers.

Cox, through subsidiaries, has launched competitive telecommunications services in many of its cable television clusters.[1/] Its telecommunications services are available to both residential and business customers and in the course of conducting its business, Cox will extend its competitive telecommunications services to serve newly constructed buildings or new developments. If the Commission were to endorse the Idaho PUC's reasoning and adopt a general rule, state commissions would be free to treat the "first provider" of service to a new

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1/ These telecommunications companies filed for and received state commission certification to operate as new entrant local exchange carriers.

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No commenter disputes that U S West is the incumbent local exchange carrier whose operations must be compared to CTC's to determine whether CTC should be treated as an incumbent. It is noteworthy, however, that none of the Idaho PUC's supporters even attempts to prove that CTC actually "occupies a position in the market for telephone exchange service *within an area* that is comparable to [U S West]."[3/] Nor can they. U S West's study area for Idaho encompasses not only Boise and the area immediately adjacent to Boise in which CTC is building new facilities, but includes every inch of the state not served by another incumbent LEC. Contrary to the comments supporting the Idaho PUC, the comparability that is required under the statute is not simply a functional comparability of service, but a comparability of the serving area's physical scope.[4/] The absurdity of any different interpretation is illustrated by claims that competitive LECs serving new apartment buildings or hotels should be treated as incumbents.

3/ 47 U.S.C. § 251(h)(2)(A).

4/ This is entirely consistent with the Commission's finding in its Order determining that the Guam Telephone Authority ("GTA") was properly treated as an incumbent LEC under Section 251(h)(2). *See Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers Under Section 251(h)(2) of the Communications Act*, CC Docket No. 97-134, Report and Order, 13 FCC Rcd 13765 (1998). GTA was "the only LEC throughout Guam" (*Id.* at 13766) and "the sole provider of local exchange and exchange access services on Guam" (*Id.* at 13768). CTC's situation is distinguishable from GTA's in several respects. Guam is not just an island, but a U.S. Territory — a geographical and political designation comparable to a state, not comparable to a community, a subdivision, a town, or a building. GTA was created in 1973 by the government of the Territory of Guam to provide telephone service to the entire Territory, and operates as a semi-autonomous agency of the Territorial government. It is undisputed that GTA holds monopoly power over local telecommunications facilities in Guam; CTC merely holds a contract — which it states is non-exclusive — to build infrastructure in a new residential development.

In addition, the need to consider the incumbent's entire service area is further evidenced by the statute's independent requirement that the new LEC have "substantially replaced" the incumbent prior to being considered as a comparable carrier to the incumbent.[5/] Surely, the Congress would not have used the qualifier "substantially" if it had not intended that a broader geographic area, beyond a new housing development be examined. Thus, the failure to consider relevant geography in assessing comparability is a fatal flaw in both the Idaho PUC's argument and those of its supporters.

II. THE COMMISSION HAS SUBSTANTIAL AUTHORITY TO ORDER INTERCONNECTION UNDER SECTION 201 OF THE ACT.

In their quest to claim dire consequences from a Commission failure to declare CTC and similar carriers incumbents, the Idaho PUC proponents state that, unlike incumbents, non-incumbent LECs have no legal obligation to negotiate for interconnection or to provide resale at "wholesale" rates.[6/] Availability of interconnection, however, is easily addressed under current law.

First, as the opposition of Time Warner Telecom explains, non-incumbent LECs have substantial legal responsibilities to cooperate with competitors. Specifically, Section 251(a) and

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5/ For that matter, it is impossible to "replace" an incumbent in an area where there was no service before the CLEC arrived. This is not mere semantics — consistent with the deregulatory intent of the 1996 Act, Congress specifically limited the applicability of Section 251(c) to entrenched incumbents. If an area previously was unserved, no carrier has the historical advantages that have accrued to incumbent LECs and, therefore, there is no reason for Section 251(c) obligations to apply.

6/ *See* TRA Comments at 7.

(b) impose upon *all* LECs general duties to interconnect with competitors, make their services available for resale, provide local telephone number portability, dialing parity, and access to rights of way; and establish arrangements with competitors for the reciprocal transport and termination of telecommunications traffic. Second, those arguing that CTC and similarly situated carriers should be treated as incumbents because they might refuse to provide interconnection overlook the Commission's authority to require interconnection under Section 201. Indeed, Section 251(i) states that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."[7/]

This savings clause confirms that the Commission, under its traditional Section 201 powers, maintains its ability to order interconnection — including physical interconnection — with other carriers if it determines that such an action furthers the public interest. Section 201 thus provides a ready remedy to U S West, or any other carrier that believes a competitive LEC is unreasonably denying interconnection. This targeted alternative is far preferable to labeling a competitive LEC an incumbent simply to address a speculative interconnection concern.[8/]

7/ 47 U.S.C. § 251(i). The Supreme Court just yesterday confirmed the expansive nature of the Commission's interconnection authority under Section 201(b). *See AT&T Corp. v. Iowa Utilities Board*, No. 97-826, *Slip Opinion* issued January 25, 1999.

8/ In fact, the proponents of treating new entrants as incumbents also fail to acknowledge that the application of Section 251(c) obligations on new entrants would, by its very terms, require interconnection arbitrations and state-by-state hearings and review of each competitive LEC's interconnection costs, resale and wholesale margins, as well as importing a requirement that competitive LEC's "unbundle" the elements of their networks. Congress deemed none of these requirements necessary for new entrants and the Commission should not lightly upset the balance Congress struck.

III. CONCLUSION

For these reasons, Cox urges the Commission not to grant the Petition filed by the Idaho PUC. The relief sought is not only contrary to the specific provisions of Section 251(h)(2), it also is unnecessary in light of the obligations *all* LECs have to provide interconnection under Section 251(a) and (b) as well as the Commission's ability to order interconnection under Section 201 after having determined that a particular request is reasonable. Declaring CLECs serving new developments to be ILECs would only stymie attempts by facilities-based new entrants to provide any significant degree of competition to the incumbent LEC.

Respectfully submitted,

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January 26, 1999

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 26th day of January, 1999, a copy of the foregoing Cox Communications, Inc. Response to Comments and Oppositions was sent by hand delivery and by first-class mail to the following:

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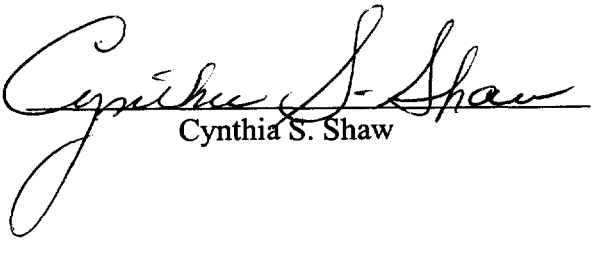

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